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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1934.

No. [redacted] 39

DE FOREST HULBURD,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
First National Bank Building,
Chicago, Illinois,
Counsel For Petitioner.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Henry A. Gardner, Alfred T. Carton and John E. Hughes, on behalf of DeForest Hulburd, pray that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on January 11, 1935 (rehearing denied April 15, 1935), reversing the decision of the Board of Tax Appeals reported in *27 B. T. A. 1123.*

QUESTIONS PRESENTED.

(1) Whether the Circuit Court of Appeals had the right to hold respondent liable and reverse the decision of the Board on a ground neither asserted by the Commissioner in the notice of deficiency nor before the Board of Tax Appeals, nor in the assignment of errors in the appeal petition, but raised for the first time in the Circuit Court of Appeals in the Commissioner's brief.

(2) Whether *Section 281 (b) of the Revenue Act of 1926 (U. S. C. A., Title 26, Sec. 1070)* is retroactive.

(3) Whether *Section 280 of the Revenue Act of 1926 (U. S. C. A, Title 26, Sec. 1069)* creates any liability.

(4) Whether a notice sent to executors a year after their discharge by the Probate Court is sufficient to extend the statute of limitations for the enforcement of an alleged existing liability of a non-existent estate.

(5) Whether a liability under the trust fund doctrine survives to executors or legatees who have concededly received no assets impressed with a trust.

(6) Whether if the retroactive construction of the statute by the Court of Appeals is correct it offends the *Fifth Amendment.*

STATUTES INVOLVED.

Revenue Act of 1926, C. 27, 44 Stat. 9.

Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as

the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in *subdivision (d) or (f)* of this section or in *sections 279, 282,* or *1001,* no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of *section 3224 of the Revised Statutes* the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. *(U. S. C. App., Title 26, Sec. 1048.)*

Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war profits tax Act.

(2) The liability of a fiduciary under *section 3467 of the Revised Statutes* in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods, then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under *subdivision (a) of section 274* to the transferee of fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee. *(U. S. C. App., Title 26, Sec. 1069.)*

Sec. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in *section 280*, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under *subdivision (a)* or *(b)* shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under *subdivision (a)* or *(b)*, notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. *(U. S. C. App., Title 26, Sec. 1070.)*

STATEMENT.

The petitioner was executor of the estate of Charles H. Hulburd, who died January 14, 1924. He was discharged by the Probate Court as executor on February 26, 1925, and the estate declared settled and the final account of the executors showing how they had distributed the estate approved (R. 64). One year after his discharge and on February 26, 1926, the *Revenue Act of 1926*, which was construed to impose a liability upon petitioner

by the Circuit Court of Appeals, was enacted. Eight months thereafter the Commissioner first made this claim against petitioner in the case at bar.

Petitioner's intestate, Charles H. Hulburd, during his lifetime and in the year 1919 had received $8,000 as a dividend from the Van Sicklen Company. The Van Sicklen Company dissolved in September 1919, after transferring its assets to another corporation (R. 38). The Van Sicklen Company filed a return and paid the tax which it computed to be due, but on November 17, 1924, the Commissioner made an additional assessment of income and profits taxes and penalties against the Van Sicklen Company (which as aforesaid had dissolved in September 1919) in the amount of $227,872.06 plus a penalty of $113,936.03.

When the Commissioner learned the Van Sicklen Company was not in existence he, having ascertained that Charles H. Hulburd then deceased, had received a dividend of $8,000 from it in 1919 and that petitioner had been executor of decedent's estate, mailed on October 27, 1926, (one year and eight months after petitioner's discharge) a notice of deficiency addressed as follows:

"Estate of Charles H. Hulburd,
c/o DeForest Hulburd,
86 E. Randolph Street,
Chicago, Illinois,

and claiming a liability* as follows:

"As provided by *Section 280 of the Revenue Act of 1926*, there is proposed for assessment against the estate the sum of $24,000.00, constituting its liability as a transferee of the assets of the Van Sicklen Company" (R. 15).

* In deciding the case on the merits in favor of this petitioner the Board of Tax Appeals said (R. 78): "It would be an anomaly to recognize an existing transferee liability of a non-existing tranferee."

Petitioner appealed to the Board of Tax Appeals and the Commissioner, upon whom the statute places the burden of proof in transferee proceedings failed to prove that the estate or this petitioner in any capacity had ever received any of the assets of the Van Sicklen Company and the Board of Tax Appeals in *27 B. T. A. 1123*,* gave judgment on the merits for this petitioner, saying that the claim in the above quoted notice of deficiency was against the estate as transferee and (R. 77):

> "The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its assets and was dissolved prior to decedent's death and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate."

The correctness of this finding of the Board cannot be questioned here and was not challenged, either in brief or argument, by the Commissioner in the Circuit Court of Appeals but that Court reversed the decision of the Board on the ground that notwithstanding petitioner had received none of the assets of the Van Sicklen Company, either as executor or legatee, nevertheless he was made liable as a transferee** by the statute quoted on page 3 hereof.

As the Circuit Court of Appeals stated in its opinion (R. 100), the question of the liability of the petitioner as a legatee had not been raised by the Commissioner before

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* The Board by order severed the issues and tried the question of the statute of limitations first but decided this against the petitioner. 21 B. T. A. 23 (R. 68-74).

** Concededly no assets of the taxpayer (Van Sicklen Company) were transferred to petitioner and the Board so found.

the Board of Tax Appeals. Neither was it raised in the above quoted notice of deficiency (R. 15) which was addressed solely to the estate and which asserted a liability as a transferee against the estate alone as fully appears from the above quotation from it, nor was it made in the assignment of errors in the petition for review of the Board's decision (R. 85). It was raised for the first time in the Commissioner's brief filed in the Circuit Court of Appeals on January 27, 1934.

SPECIFICATION OF ERRORS TO BE URGED.

The petitioner urges that the Circuit Court of Appeals erred:

(1) In holding petitioner liable and reversing the Board's decision on a ground neither asserted by the Commissioner in the notice of deficiency nor before the Board of Tax Appeals, nor in the assignment of errors in his petition for review of the Board's decision;

(2) In holding that *Section 281 (a) and (b) of the Revenue Act of 1926* was retroactive and imposed liabilities upon persons who had been discharged as executors long prior to its enactment;

(3) In holding that *Section 280 of the Revenue Act of 1926* created a liability and that thereunder petitioner was liable;

(4) In holding that the statute of limitations was tolled by the deficiency notice sent to the executors on October 27, 1926, or a year and eight months after their discharge;

(5) In failing to hold that the sections of the Act as construed by it violated the *Fifth Amedment to the Federal Constitution;*

(6) In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT.

1. The Court below stated that the question whether petitioner was liable as an executor was not raised by the Commissioner before the Board of Tax Appeals (R. 100). Neither is it asserted in the notice of deficiency (R. 15), nor in the assignment of errors (R. 85).

On the question of whether the Circuit Court of Appeals can reverse a decision of the Board of Tax Appeals on a question not presented or urged before that Board, the decisions of the Circuit Courts of Appeal are in sharp conflict. The following cases among others are in conflict on this point with the case at bar: *Helvering v. J. L. Brandeis & Sons, 75 F. (2d) 487, 489 (C. C. A. 8th); Tulsa Tribune Co. v. Commissioner, 58 F. (2d) 937, 940 (C. C. A. 10th); Glassell v. Commissioner, 42 F. (2d) 653 (C. C. A. 5th); Hartley v. Commissioner, 72 F. (2d) 352 (C. C. A. 8th); Atkins Estate v. Lucas, 36 F. (2d) 611, 613 (App. D. C.); Tricou v. Helvering, 68 F. (2d) 280, 286 (C. C. A. 9th).*

The opposite view is taken in *Helvering v. General Utilities & Operating Co., 74 F. (2d) 972, 976 (C. C. A. 4th),* and other decisions of the same Court.

2. Petitioner had been discharged as executor by valid Court order one year before the *enactment of the Revenue Act of 1926.* Nevertheless the Circuit Court of

Appeals in its opinion (R. 103, 104) holds *Section 281 (b)* applicable to him. This is squarely in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Liberman's Committee v. Commissioner, 54 F. (2d) 527,* wherein at page 529 it is expressly stated that this section is not retroactive. It also fails to give effect to decisions of this Court holding that a retroactive construction is not to be given a statute unless its words make such construction imperative. This point is of great importance because if this statute is retroactive anyone who has ever been an executor and was discharged before its enactment remains liable unless he gives notice to the Commissioner after its enactment that he is no longer acting as such, and until the decision in the case at bar it has never been so construed either by the Department or by the Courts.

3. On the merits the Circuit Court of Appeals in its opinion in the case at bar said:

> "The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executors as a fund impressed with a trust. He does not and cannot, therefore, base his right to assess the tax on any trust fund theory *other than that created and defined by the statute.*" (Italics ours.)

The entire opinion of the Court proceeds upon the theory that *Section 280* creates and defines a liability. This is directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Oswego Falls Corporation, 71 F. (2d) 673, 676;* also with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Exchange National Bank of Shreveport v. United States, 65 F. (2d) 316;* and is opposed to the statement of this Court in *Phillips v. Commissioner, 283 U. S.*

589. It is also opposed to the express statements in the Conference Report and in the Report of the Senate Finance Committee quoted at page 19 of the brief in support of this petition. This question is a fundamental one in the construction of this law and one of obvious importance.

4. In holding that a notice addressed to executors a year and eight months after their discharge is sufficient to extend the statute of limitations for the assertion of a liability against a then non-existent estate the decision in the case at bar is directly in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Nauts v. Clymer, 36 F. (2d) 207*, and the decision of the Circuit Court of Appeals for the Ninth Circuit in *Lindley v. United States, 59 F. (2d) 336.*

5. On general principles of law the decision is unsound. It deals with a provision of law of general and national application and importance and unless reversed will create confusion in the law.

6. Finally it is submitted that the retroactive construction of the law by the Circuit Court of Appeals renders it arbitrary and capricious and contrary to the *Fifth Amendment to the Federal Constitution.*

Wherefore it is respectfully submitted that his petition should be granted.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
First National Bank Building
Chicago, Illinois.
Counsel for Petitioner.

May 1, 1935.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals is reported in *27 B. T. A. 1123* (R. 75-79). The opinion of the Circuit Court of Appeals (R. 90) is not yet reported but appears in the record at pages 97 to 105.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 11, 1935 (R. 106). A petition for rehearing was denied April 15, 1935 (R. 107).

The jurisdiction of this Court is invoked under *Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.*

QUESTIONS PRESENTED, STATUTE INVOLVED, ETC.

A statement of the questions presented, statute involved, specification of errors to be urged and a statement of the case has been made in the foregoing petition.

ARGUMENT.

In holding petitioner liable as a legatee, notwithstanding an utter lack of proof or claim that he received any property of the Van Sicklen Company, the Circuit Court of Appeals passed upon a question not raised before the Board of Tax Appeals, nor in the Commissioner's notice of deficiency, nor even in the assignment of errors in the Commissioner's petition for appeal to the Circuit Court of Appeals.

The Court in its opinion said (R. 100):

> "The Commissioner did not raise and the Board did not pass upon, the question of liability of a legatee or beneficiary as a statutory transferee."

In reversing the decision of the Board of Tax Appeals on a claim not made before it and consequently not passed upon by it, the decision in the case at bar is squarely in conflict with the decisions of the Courts of Appeal for the Eighth, Ninth, Tenth and Fifth Circuits and with a decision of the Circuit Court of Appeals of the District of Columbia but is supported by decisions of the Court of Appeals for the Fourth Circuit.

In *Helvering v. J. L. Brandeis & Sons, 75 F. (2d) 487* the Circuit Court of Appeals for the Eighth Circuit said at page 489:

> "Aside from the failure of the record to disclose facts sufficient to support this contention of petitioner, it is to be noted that the Commissioner in his notice of deficiency did not state this ground for disallowing the deduction claimed. He said: 'Since the resolutions of the board of directors pertaining to the salary increase do not include the fiscal year ending January 31, 1928, no deduction can be taken

in that year for accrued salaries deductible in preceding years and your contentions in respect thereto are denied.' Nor did the Commissioner urge this new ground before the Board of Tax Appeals. This appears from the opinion of the Board: 'It is stated in the brief filed on behalf of the respondent (petitioner herein) that the deduction of $80,000 for additional salary paid to George Brandeis in 1928 was disallowed by the respondent upon the ground that it represented an adjustment of the additional compensation agreed to be paid for the fiscal years 1923 to 1927 and should have been deducted in the preceding years. The respondent's position is not supported by the evidence of record.'

This new ground, therefore, is not before this Court on the Commissioner's petition to review the decision of the Board of Tax Appeals. *Hartley v. Commissioner (C. C. A. 8) 72 F. (2d) 352; Tulsa Tribune Co. v. Commissioner (C. C. A. 10) 58 F. (2d) 937; Glassell v. Commissioner (C. C. A. 5) 42 F. (2d) 653.*"

The case at bar is a much stronger case, for here not only did the Commissioner fail to present to the Board the ground of the legatee's liability, but *even the very question of the liability of the legatee* was not presented to the Board and was not raised in the notice of deficiency nor in the assignment of errors in the petition for a review of the Board's decision.

In *Tricou v. Helvering, 68 F. (2d) 280,* the Court of Appeals for the Ninth Circuit said at page *286:*

"The question the petitioner seeks to present to us is raised for the first time on this appeal. * * * The question sought to be raised here was not presented to or decided by the Board of Tax Appeals, and for that reason error cannot be predicated on their failure to consider that matter."

For other decisions holding the same see the petition for the writ herein.

Opposed to these decisions of the Courts of Appeal for the Eighth, Ninth, Tenth and Fifth Circuits, and the Court of Appeals of the District of Columbia is the decision of the Court of Appeals for the Fourth Circuit in *Helvering v. General Utilities & Operating Co., 74 F. (2d) 972, 976,* and other decisions of that Court cited therein.

The reasoning of the Fourth Circuit that "Courts exist to do justice and not to furnish a forum for the technical skill of counsel," carried to its logical conclusion would justify a Court in disregarding all rules of law if the result of applying them did not conform to such ideas of justice as the members of the particular Court might happen to entertain. It seems to overlook that taxes are not creatures of abstract justice and do not exist in equity, but are purely statutory imposts.

The sharp conflict among the Circuit Courts of Appeal on this important question of procedure in appeals from the Board of Tax Appeals, would alone justify the granting of the writ.

This Court has many times held that a point not made in the Court below may not be first raised by one seeking to upset the judgment on appeal. *Blair v. Oesterlein Co., 275 U. S. 220, 225; Magruder v. Drury, 235 U. S. 106, 113; San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 97; Burnet v. Commonwealth Imp. Co., 287 U. S. 415, 418.*

Apart from the above there is another important reason why the question of the liability of the legatee should not have been passed upon by the Circuit Court of Appeals.* In order to toll the statute of limitations the law requires the Commissioner to issue notice of deficiency to the person from whom the tax is claimed within a limited

*The belated allowance of this claim prevents its deduction in computing the federal estate tax because the statute of limitations on a refund claim has run.

time. The notice of deficiency issued in this case was addressed only to the decedent's estate and merely states* (Rec. 15, 16):

> "There is proposed for assessment against the estate the sum of $24,000, constituting its liability as a transferee of the assets of the Van Sicklen Company."

No other or different claim was made and when the case was decided by the Circuit Court of Appeals in 1935, and when the claim that the legatee was liable was first made in that Court by the Government in 1934 in its brief, the statute of limitations had for many years run on the making of a new and different claim other than that made in the notice of deficiency, and a notice mailed to the legatee at the date the claim against him was first made would have been years too late.

There is no evidence to show and it has not been proved by the Government that the estate was at any time "a transferee of the assets of the Van Sicklen Company" as claimed in the notice of deficiency, and the Board expressly found it was not (R. 77). The legatee received his property from the executors and was not a transferee inasmuch as the executors were not.

SECTION 281 (b) OF THE REVENUE ACT OF 1926 IS NOT RETROACTIVE, AND IN HOLDING THAT IT IS THE CASE AT BAR IS IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Section 281 (b) of the Revenue Act of 1926 was enacted a year after the petitioner had been discharged as executor and the distribution of the estate approved by the Probate Court.

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* The notice of deficiency will be combed in vain for any claim against the legatee.

The Board of Tax Appeals in its opinion in the case at bar said (R. 78):

> *"Section 281, Revenue Act of 1926,* and *Section 312, Revenue Act of 1932,* were not in effect during the existence of this estate and imposed no duties upon the executors here. The decisions under those sections are therefore not pertinent."

Nevertheless the Circuit Court of Appeals in reversing the decision of the Board held that this section was applicable (R. 103-4). In construing this section to be retroactive the case at bar is on this point squarely in conflict with the decision of the Court of Appeals for the Second Circuit in *Liberman's Committee v. Commissioner, 54 F. (2d) 527,* wherein the Court at page *529* quotes the statute and the Treasury Regulation thereunder and says:

> "Secondly, and this seems to us a conclusive answer to the contention, *section 281 (a), 26 U. S. C. A. Sec. 1070 (a),* speaks prospectively from the date of its enactment, February 26, 1926 (see *section 286, (26 U. S. C. A., Sec. 931, note)*), and relates only to actual fiduciaries who thereafter give notice to the Commissioner that they are acting as such."

The opinion in the case at bar makes no attempt to distinguish this case. The Circuit Court of Appeals for the Second Circuit and the Board of Tax Appeals in the case at bar are manifestly correct and the Circuit Court of Appeals for the Seventh Circuit is manifestly wrong in giving this statute retroactive effect. Otherwise any person who had been an executor and was discharged prior to the date of the enactment of the *Revenue Act of 1926* would be made liable by that Act unless he thereafter gave notice that he was no longer acting as executor. this is the law thousands of executors discharged years ago are still liable. Such a construction is opposed to the familiar rule against retroactive construction many times stated by this Court. (See *Union Pacific R. R. Co. v. Laramie Stock Yards Co., 237 U. S. 190, 199.)* There are no

words either in the statute nor in the regulation itself purporting to be retroactive and to apply to estates closed prior to its passage, and hitherto no Court has so construed it.

IN HOLDING THAT SECTION 280 CREATED AND DEFINED A LIABILITY THE DECISION IN THE CASE AT BAR IS IN CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEAL FOR THE SECOND AND FIFTH CIRCUITS.

The Court in its opinion in the case at bar states (R. 101-2):

> "The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executors as a fund impressed with a trust. He does not and can not, therefore, base his right to assess the tax on any trust fund theory other than that created and defined by the statute."

Section 280 of the statute does not create and does not define any liability and as respondent can only base his claim on the assumption that it does, he must fail. In stating that it did, the decision in the case at bar is squarely in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Exchange National Bank of Shreveport v. United States, 65 F. (2d) 316*, and with the decision of the Court of Appeals for the Second Circuit in *Commissioner v. Oswego Falls Corporatoin, 71 F. (2d) 673, 676.* It is also contrary to the statement of this Court in *Phillips v. Commissioner, 283 U. S. 589.* The Board of Tax Appeals was right in stating (R. 78): "*Section 280 of the Revenue Act of 1926* did not create any liabilities, but only provided a new remedy for enforcing existing liabilities. *Phillips v. Commissioner, 283 U. S. 589,*" and the Circuit Court of Appeals in the case at bar was wrong in holding otherwise.

The *Conference Report on the Revenue Act of 1926, 69th Congress, First Session, Report No. 356,* states at page *43:*

> *"Without in any way changing the extent of such liability of the transferee under existing law,* the amendment enforces such liability (whether in respect of the tax as originally returned by the taxpayer or a deficiency therein) in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the courts." (Italics ours.)

The Senate Finance Committee Report (which is quoted in the opinion of the Board of Tax Appeals at page 71 of the Record) states as follows:

> "It is the purpose of the Committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the Act for the enforcement of tax deficiencies. *It is not proposed, however, to define or change existing liability.* The section merely provides that *if the liability of the transferee exists under other law,* then that liability is to be enforced according to the new procedure applicable to tax deficiencies."* (Italics ours.)

In the case at bar the respondent merely proved that Charles H. Hulburd in 1919 received $8,000 from the Van Sicklen Company. He did not trace any of this money into the hands of the executors or into the hands of this petitioner, who as legatee is one step farther removed from Charles H. Hulburd than his executors. Between 1919, the date of his death, and 1924, Charles H. Hulburd very likely did and for ought that appears spent the $8,000 which he received from the Van Sicklen Company

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* This report is also quoted in **Wire Wheeled Corporation of America, 16 B. T. A. 737, at page 742, which was affirmed by the Circuit Court of Appeals for the Second Circuit in 46 F. (2d) 1013.**

in 1919, for current expenses during the period of approximately five years between its receipt and his death. From the mere fact that his legatee years afterwards received $20,685.79 in cash, it cannot be assumed that the $8,000 received in 1919 by the decedent from the Van Sicklen Company, or any part thereof was included in this sum. This principle of law is well established. A statement of it appears in the Article on *"Trusts"* in *65 Corpus Juris, paragraphs 889-900,* and particularly in *paragraph 900.* In *St. Louis & S. F. R. Co. v. Spiller, 274 U. S. 304,* this Court said at page *310:*

> "The money was not earmarked. It was mingled when collected with other money received from operation. And no special account was kept of it. The latest exaction occurred five years before the appointment of the receivers. The assertion that the money collected can be traced into the receivers hands is confessedly without any support except the stipulated fact that throughout the ten years which elapsed between the earliest exaction and the transfer of the properties to the new company, the old one and the receivers had, at all times, in the several banks on which checks for current expenses were drawn, a working balance, in the aggregate, largely in excess of Spiller's claim. Such a showing fails to bring the present case within the rule by which, when trust funds are mingled with others, the *cestui* may assert an equitable lien upon the mingled mass to the extent of his contribution thereto. *American Can Co. v. Williams, 101 C. C. A. 634, 178 Fed. 420, 423; Re: A. D. Matthews' Sons, 151 C. C. A. 635, 238 Fed. 785, 787.* An illegal exaction does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks. For aught that appears, all the money illegally exacted may have been spent for current operating expenses."

The last sentence of this opinion applies to the case at bar.

A fundamental misconception running through the whole opinion of the Circuit Court of Appeals in this case is that *Section 280* created a tax liability on the part of Charles H. Hulburd. The Court said:

> "At the time Hurburd died, he was liable *to be assessed for this tax.* Upon his death his estate was equally liable. Upon the death of a transferee, his estate *becomes liable for the tax* to which the deceased transferee was subject. The estate was not the transferee of a transferee. The estate was the original transferee. A legatee of the deceased to whom the estate was passed was also by *Section 280 (3) (f)* an original transferee."* (Italics ours.)

Again it said:

> "The Commissioner had the right *to assess the tax* against any transferee of a taxpayer who neglected to pay his taxes." (Italics ours.)

Again it said:

> "At the time, the statute which *authorized the assessment of a tax against the transferee* had not been enacted." (Italics ours.)

Again the Court said in stating the question involved:

> "May *a tax assessed against a transferee* levied within the time fixed by statute be enforced (1) against the legatee of said transferee in case the transferee died, or (2) against the executor of the will of said transferee in case the transferee died before *the act authorizing the assessment of a tax against a transferee* was passed?" (Italics ours.)

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* One is not a transferee unless there has been transferred to him property of a taxpayer. No property of the taxpayer (Van Sicklen Co.) was transferred either to the estate or the legatee. Hence the Board of Tax Appeals was right in saying the estate was not liable, and the Court of Appeals wrong in assuming the statute imposed a liability upon it irrespective of the receipt of the taxpayer's property and defined it to be a transferee.

At the outset it may be stated that no attempt was ever made to collect this liability from the transferee, Charles H. Hulburd, during his lifetime, nor was any tax ever assessed against him or any proceeding against him even thought of, nor was any notice of the claim given the executors before their discharge.

The liability which *Section 280* does not create, but merely provides a new remedy for the enforcement, *is not a tax liability at all* as the Court of Appeals repeatedly states in its opinion. The *Senate Finance Committee* in its *Report on Section 280,* stated (R. 71):

> "In all the above cases *the transferee is not liable for the tax of the transferor,* but is by reason of the receipt of the assets subject to an independent *liability* in his own person and payable out of his own estate, *arising under* the *trust fund doctrine* or some similar theory." (Italics ours.)

From the above statement of the Senate Finance Committee as well as from the established principles of law, it is clear that the liability is not a tax liability and that the decedent was never liable for the tax of the Van Sicklen Company nor for any of its debts to the Government. If he was liable at all it was under the trust fund theory which permits the creditor to lay hold of the fund impressed with a trust, wherever located. Inasmuch as such a liability in its essence is inseparable from the trust fund, it depends upon tracing and specifically locating the fund impressed with the trust and it is obvious that it does not survive to executors, nor does it pass to legatees unless the trust fund has passed and can be traced into their hands and custody. This was not done in the case at bar. The Board of Tax Appeals said (R. 77):

> "The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its as-

sets and was dissolved prior to decedent's death, and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate."

The burden of proving otherwise was placed by the statute on the Commissioner in this proceeding and he failed to offer any evidence tending to show the contrary. Indeed, he must concede the above quoted statement of the Board to be true. He did not claim otherwise in the Court of Appeals and cannot claim otherwise here.

We emphatically challenge the Court's attention to the misconception of law involved in the theory that because the decedent would have been liable under the trust fund doctrine had he lived, his estate or legatees are liable even though they did not receive any property of the Van Sicklen Company or any property impressed with a trust. The reason they are not liable is because the liability of the decedent depends solely upon the trust fund doctrine. *United States v. Updike, 8 F. (2d) 913, 917; United States v. Garbutt, 35 F. (2d) 924, 925.* And the Courts in *Section 280* cases have applied the trust fund doctrine with all its limitations. *Commissioner v. Keller, 59 F. (2d) 499, 501.*

At Common Law where one received the assets of a dissolved corporation there was no liability. This situation caused Mr. Justice Story to discover the trust fund doctrine in equity. That is the only theory of equitable liability. There being no liability at common law in such situation, if any liability exists at law as distinguished from equity it is purely statutory and neither before the Board nor in the Court of Appeals did the Commissioner cite or rely upon any statute claimed to create liability

other than *section 280, supra.* Consequently there is no liability at law and any liability in equity must depend on the trust fund doctrine.

A liability under the trust fund doctrine is inseparable from the fund impressed with the trust fund and if that fund does not pass to the executor or the legatee the liability does not pass. *Kessig v. Lea, 168 Minn. 14; 196 N. W. 655.* Where a decedent has received property impressed with a trust, his executors are only liable for such part of it as has actually come into their possession and not for the full amount received by decedent. *In re Reads Est., 253 N. Y. S. 648; 141 Misc. 716.* This is because a trust fund liability is inseparable from the trust property.

If the decedent had been liable for the tax of the Van Sicklen Company, as the Court of Appeals, contrary to the statement in the Senate Finance Committee report, erroneously assumed, this would be another and a different kind of liability and a different question would be presented.

IN HOLDING THAT EXECUTORS WERE LIABLE THE DECISION IN THE CASE AT BAR IS IN CONFLICT WITH DECISIONS OF THE SIXTH AND NINTH CIRCUITS.

In *Nauts v. Clymer, 36 F. (2d) 207 (C. C. A. 6th)* the facts were as follows:

On March 15, 1920, the decedent filed his 1919 return. Hence the statute of limitations would have expired March 15, 1925. The Commissioner mailed a 60-day letter on December 10, 1924, which if it was a sufficient notice would have extended the statute of limitations for

sixty days or until May 15, 1925, under the provisions of *Section 277 of the Revnue Act of 1924 (26 U. S. C. A. Sec. 1057 and Note)*. The tax assessed April 3, 1925. The plaintiff, legatee of $300,000 under the will, paid the tax and brought suit to recover it on the ground that it was assessed after the statute of limitations had run. The case turned upon the sufficiency of the notice to extend the statute. If it extended the statute, the assessment was in time, otherwise it was not. The notice was addressed as follows:

"George H. Marsh, Deceased,
L. C. Morgan, Executor,
Van Wert, Ohio."

When the notice was sent the executor had been discharged and the estate administered as in the case now at bar. The Circuit Court of Appeals for the Sixth Circuit affirmed the District Court and held that the notice was insufficient to extend the statute of limitations.

In the case at bar the notice was addressed as follows (R. 15):

"Estate of Charles H. Hulburd,
c/o De Forest Hulburd,
86 East Randolph Street,
Chicago, Illinois"

This notice read in part as follows:

> "As provided by *Section 280 of the Revenue Act of 1926*, there is proposed for assessment against the estate the sum of $24,000.00, constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois. * * *"

At the time this notice was sent to the estate it was not in existence and De Forest Hulburd and the other executor had been discharged as was the case in *Nauts v. Clymer*.

The case of *Nauts v. Clymer* has been cited in such a way as to indicate concurrence therein by the Circuit Court of Appeals for the Second Circuit in *Lieberman's Committee v. Commissioner, 54 F. (2d) at page 530.*

In the opinion of the Board of Tax Appeals holding against petitioner on the issue of statute of limitations, the decision of the Circuit Court of Appeals for the Sixth Circuit in *Nauts v. Clymer* is "distinguished" by the following *ipse dixit* of the Board:

> "While indicating the deficiency notice mailed appeared insufficient, having been addressed to only one of the three executors who had distributed the estate and been discharged, the Court rather emphasized the fact that the limitation expired before the assessment of April 3, 1925."

This overlooks the point that *the limitation would not have expired before the assessment of April 3, 1925, if the notice had been sufficient* and that in order to conclude that the limitation had expired before the assessment of April 3, 1925, it was necessary for the Court to squarely hold that the notice of deficiency was insufficient to extend the statute of limitations because of the discharge of the executor and settlement of the estate prior to its mailing and the Court did so hold.

Obviously the case of *Nauts v. Clymer* cannot be distinguished from the case at bar unless the fact that here the discharged executor appealed to the Board of Tax Appeals (and in the very petition on appeal pleaded his discharge and annexed thereto a certified copy of it (R. 5-9)) put him in a worse position than if he had paid the tax and then sued to recover it, as was done in *Nauts v. Clymer.* Such a construction of the statute "is not consistent with the great remedial purposes of the legislation creating the Board of Tax Appeals" (quoted from

Helvering v. Taylor, 293 U. S. ....), which was that one might have an opportunity to litigate a question before paying the tax in the same way that hitherto he could litigate it after paying the tax. These executors did not mislead or deceive the Commissioner because they pleaded their discharge, the distribution of the estate and set up the statute of limitations in the petition on appeal filed with the Board of Tax Appeals (R. 6). The effect of the Court of Appeals' decision on this point is to put them in a worse position because they appealed than they would have been in had they not appealed.

Furthermore, a bare reading of the decision of the Circuit Court of Appeals for the Ninth Circuit, in *Lindley v. U. S., 59 F. (2d) 336*, discloses that it is in conflict with the decision in the case at bar on the question of the liability of discharged executors for a tax not asserted against them until after their discharge.* Nor can any distinction be found between the liability of the executor there and here in any alleged difference between the statutes of California relative to executors and those of Illinois. The order of the State Court discharging the executors in the case at bar is not subject to collateral attack. *(Simmons v. Saul, 138 U. S. 439; Stovall v. Banks, 10 Wall. 538)*, and so far as the law of Illinois goes this belated claim could not have been successfully pressed against the estate now or at the time it was first made. *(People v. Small, 319 Ill. 437, 447;* see also *Descent & Distribution, 18 Corpus Juris, Sec. 307, page 693.)* Although the Government argued otherwise in the Court of Appeals that Court did not and could not so hold.

* In that case the executor was held liable as a legatee because it was proved that he actually received the money claimed by the Government. There was no such proof in the case at bar.

IF THE STATUTES INVOLVED BE CONSTRUED TO IMPOSE RETROACTIVE LIABILITY THEY VIOLATE THE FIFTH AMENDMENT.

If the statutes involved in the case at bar are correctly construed by the Circuit Court of Appeals as imposing retroactive liability upon estates defunct and out of existence long before their enactment and levying a tax upon legatees who have not been enriched by the receipt of the property of the transferor taxpayer, then it is submitted they are obviously arbitrary and capricious and violate the *Fifth Amendment to the Federal Constitution.* There is no power granted ot Congress to levy a tax *ex nihilo* and on account of nothing. As the Board of Tax Appeals properly observed it would be an unheard of anomaly "to recognize an existing transferee liability of a non-existing transferee" (R. 78).

CONCLUSION.

On the merits *section 280* did not create a liability. In stating that it did the decision of the Court of Appeals in the case at bar is in direct conflict with decisions of the Second and Fifth Circuits and with express statements of the Congressional Committees in charge of the legislation, made in their reports to Congress. (See also *Phillips v. Commissioner, 283 U. S. 589, 593.)*

This section merely provides a procedure for the enforcement of any pre-existing liability "at law or in equity". No principle of the common law or no statute has been cited in this case by the Commissioner, imposing any liability. If there is a liability in equity it must depend upon the trust fund theory and inasmuch as the petitioner here never received any property impressed with a trust there is no such property for the Government to recover and hence the Board of Tax Appeals was correct in holding that petitioner was not liable and the Circuit Court of Appeals was wrong in holding that he was.

Petitioner had been discharged as executor by an order of the State Court entered before he had any notice of the Government's claim. In such case *Section 3467 of the Revised Statutes* did not render him liable. (In *U. S. C. A., Title 31, Sec. 192*, this section is fully annotated and the decisions, including that of Chief Justice Marshall, are uniform in holding that there must be notice of the claim prior to discharge before an executor may be held liable under this section.)

In holding the *Revenue Act of 1926* retroactively applicable to executors who had ceased to be such before its passage by lawful order of the Court discharging them, the decision in the case at bar is in conflict with the decisions of the Second and Ninth Circuits.

In reversing the decision upon a point not made before the Board of Tax Appeals the decision is in conflict with the decision of five Federal Courts of Appeal.

The decision of the Board of Tax Appeals, reported in *27 B. T. A. 1123* (R. 75-79), which we ask your Honors to read at this point, is manifestly correct and in harmony with the overwhelming weight of authority and the decision of the Court of Appeals is out of harmony with the weight of authority on the points heretofore pointed out. The conflict between the decision in this case and other Courts of Appeal on any one of the four important points upon which it conflicts would alone justify the allowance of the writ and *a fortiori* a conflict on all four of these points makes a review by this Court imperative.

For the foregoing reasons this writ should be granted.

All of which is respectfully submitted.

HENRY A. GARDNER,
ALFRED T. CARTON,
JOHN E. HUGHES,
First National Bank Building,
Chicago, Illinois,
Counsel For Petitioner.